Filed 3/17/09 P. v. Murphy CA2/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. HOWARD L. MURPHY, Defendant and Appellant.	B197760 (Los Angeles County Super. Ct. No. TA079358)

APPEAL from a judgment of the Superior Court of Los Angeles County. Ronald V. Skyers, Judge. Affirmed.

Leslie Conrad, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Steven D. Matthews and Shawn McGahey Webb, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Howard L. Murphy (appellant) of one count of willful, deliberate, premeditated murder (Pen. Code, § 187, subd. (a))[1] (count 1); two counts of second degree robbery (§ 211) (counts 2 and 3); and two counts of attempted willful, deliberate, premeditated murder (§§ 664, 187, subd. (a)) (counts 4 and 5). With respect to counts 1, 4, and 5, personal firearm use and discharge allegations were found true under section 12022.53, subdivisions (b), (c), and (d). The same allegations with respect to use and discharge by a principal were found true under section 12022.53, subdivisions (b), (c), (d), and (e)(1). With respect to all counts, the jury found true the allegation that the offenses were committed for the benefit of a criminal street gang under section 186.22, subdivision (b)(1)(C).

The trial court sentenced appellant to prison for a term of 93 years to life. The sentence consisted of 25 years to life for the murder and a consecutive 25 years to life for the firearm enhancement in count 1; three years for each robbery (counts 2 and 3), with the sentences to run concurrently with one another but consecutively to the sentence in count 1; and 15 years to life for each attempted murder (counts 4 and 5) and 25 years to life for the firearm use enhancements in each count, with the sentences to run concurrently to one another but consecutively to the sentence in count 1. The trial court struck the gang enhancements in counts 2 and 3 and did not impose the gang enhancements in counts 1, 4, and 5.

Appellant appeals on the grounds that: (1) the trial court abused its discretion in denying his motion to sever unrelated counts, which resulted in a violation of due process; (2) he was denied effective assistance of counsel when his attorney failed to timely object to the admission of prejudicial gang evidence; (3) cumulative error combined to prejudice his right to a fair trial; and (4) the evidence is insufficient to support the gun use allegation in counts 4 and 5.

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[1] All further references to statutes are to the Penal Code unless stated otherwise.

FACTS

Prosecution Evidence

Counts 1, 4, and 5: Murder and Attempted Murder

On March 24, 2005, Clararetta Henderson (Henderson) was visited by her aunt, Stacy Smith (Smith), and her aunt's boyfriend Lawrence Myles (Myles). Henderson shared an apartment with William Givens (Givens) in the 107th block of South Figueroa Street in Los Angeles, which was territory of the Denver Lane Blood (DLB) gang. DLB gang members wore red clothing. Smith and Myles remained in the apartment when Henderson left for work. Myles was not a gang member.

Smith asked Myles to go to a neighboring liquor store to buy some chips at approximately 8:30 p.m. When Myles left, Smith and Givens were on the balcony of the apartment. Givens saw Myles leave the building and walk to the front gate. As Myles passed through the gate, a black Dodge Intrepid drove by and stopped at the curb in front of the liquor store. A Black male stepped out of the passenger side of the Intrepid and walked toward Myles. The Black male was 20 or 21 years old and measured five feet six inches in height. He was dressed in black except for a red beanie. The Black male began firing a rifle at Myles. Myles fell to the ground, and the shooter stood over him and continued firing. After firing approximately 15 shots, the Black male fired at Givens who was on the balcony. At that time, Givens's friend, a man named Gary, was also on the balcony. All three persons on the balcony ducked and crawled into the apartment. A bullet grazed Smith's back. Myles died from multiple gunshot wounds that were consistent with rifle fire.

When the shots rang out, two officers from the Los Angeles Police Department (LAPD) were in an unmarked vehicle heading to Figueroa Street on 108th Street when they heard automatic gunfire. As they reached the intersection with Figueroa Street, both officers saw a Black male firing an assault rifle in an upward direction. He was dressed in dark clothing and wearing a red beanie. He was approximately 18 to 25 years old and measured between five feet seven inches to five feet nine inches in height, and he weighed 150 to 170 pounds. Sergeant Jovel, who was driving, only caught a glimpse of

the shooter's face. Officer Mejia had a good view of the shooter, whom she later identified in a photographic lineup. She chose appellant's picture. Officer Mejia saw appellant's face for 10 seconds, and for one second he looked directly at her. Her line of sight was unobstructed, and she believed he was only 60 feet away. The intersection was well lit by street lights, vapor lamps, and light from surrounding buildings. Officer Mejia also identified appellant at the preliminary hearing and at trial.

Officer Mejia saw appellant lower the rifle to the "low ready position" as he walked backwards to a black or dark vehicle that may have been a Dodge Intrepid. Appellant entered the front passenger seat, and the car drove rapidly south on Figueroa Street before turning right onto 109th Street. Officer Mejia and Sergeant Jovel followed the shooter's car, but could not keep up.

LAPD Officers Brett Clark and Roger Fontes heard the broadcast about the shooting during their patrol. Earlier that afternoon, two members of the Raymond Avenue Crips (RAC) had been shot. The victims were Eric Blythe (Blythe), known as "Little Pooh," and Myfilia Johnson, known as "Ms. Moose." The perpetrators were believed to be members of DLB, who were rivals of the RAC. Fearing a retaliatory shooting would occur, the LAPD had increased its patrols. At approximately 7:30 p.m. that day, Officers Clark and Fontes had seen appellant, who had been Blythe's gang mentor and was known as "Pooh," in the area of 753 Laconia Boulevard, near Hoover Street. Appellant was with several other RAC members, and they were all standing near a dark colored Intrepid.

Officer Clark had seen appellant hanging out in a dark blue or green Intrepid on numerous occasions. Appellant had admitted his RAC membership to the officers previously, and they had had numerous contacts with appellant. Officer Clark was familiar with appellant's tattoos and did not know him to have a teardrop tattoo. On the day Myles was shot, both officers noticed that appellant and the other RAC members were wearing dark clothing, and appellant was wearing a red beanie. RAC members wear blue rather than red, which is a Blood gang color. Officer Fontes asked appellant,

"Why you wearing that red?" Appellant only chuckled in reply. Officer Fontes noted the red beanie on an FI card.

When Officers Clark and Fontes arrived at the scene where Myles was shot, they assisted in maintaining the integrity of the scene and filling out FI cards for witnesses. They received some information about the suspect and the vehicle, but no full descriptions. Several weeks after the murder, Officer Fontes attended a briefing during which Detective Mark Arenas provided information regarding the shooting of Myles. When Detective Arenas mentioned that the shooter had been wearing a red beanie, Officer Fontes recalled having seen appellant wearing a red beanie on the day of the shooting. He gave Detective Arenas the FI card on which he had noted the red beanie.

Officer John Jamison came into contact with appellant a week or two after the shooting. Officer Jamison noted that appellant had acquired a teardrop tattoo on his face. Officer Patrick Flaherty had several contacts with appellant and knew him as "Big Pooh." On April 26, 2005, Officer Flaherty stopped appellant and others for loitering. He created an FI card noting that appellant had what appeared to be a new tattoo of a teardrop on his left eye. In gang culture a teardrop tattoo meant that the wearer had killed someone. Appellant chuckled when Officer Flaherty asked him about the teardrop. Officer Flaherty noted on the FI card that appellant was wearing a gold necklace spelling out his moniker, "Pooh." Appellant admitted his gang membership to Officer Flaherty and gave his grandmother's address on West 126th Street as an alternative to his home address.

The police executed search warrants at appellant's home on West 53rd Street and at his grandmother's home. At appellant's home police seized a Raider's baseball cap and various photographs. A green Dodge Intrepid was parked in the driveway at appellant's grandmother's home, and appellant was inside the house. The car contained "Winnie the Pooh" floor mats and paperwork bearing appellant's name. Police found a gold Rolex chain and medallion with the word "Pooh" encircled with diamonds in the bedroom from which appellant retrieved his clothing.

Counts 2 and 3: Robberies

At approximately 4:30 p.m. on April 13, 2005, Kiyona Hillman (Hillman) drove Linnae Collier (Collier) and a third female known as Scootie to an apartment building in the area of Vermont Avenue and El Segundo Boulevard so that Collier could keep an appointment to meet someone. Hillman pulled to the curb near a group of males who were shooting dice. A Black male approached Hillman's car and kicked in the driver's side window. A second Black male holding a baseball bat stood nearby and watched as the first male reached into the car and removed the car radio "like a pro." The robber then took Hillman's and Collier's purses, Collier's necklace and earrings, and Collier's and Scootie's cell phones. The women did not try to stop the perpetrator out of fear. The robber handed the goods to the other male and told the women to "get the fuck up out of there." Hillman drove forward but had to make a U-turn because the street was a dead end. As she passed the group again, someone threw a bat at the car and struck the fender. The robber yelled, "Get the fuck out of here. This is Raymond Crip."

After obtaining medical attention for cuts on her shoulder, Hillman drove to a police station with Collier and reported the robbery. Hillman said that the robber was a Black male 18 to 24 years of age, five feet six inches to five feet seven inches in height, and 150 to 160 pounds in weight. She said he wore a large Rolex chain with a medallion that spelled "Pooh." At a later time, Collier told Hillman that she had learned that the robber was Howard Murphy, known as "Pooh," who was 20 years old and an RAC gang member. Hillman gave the police this information. Hillman was shown a photographic lineup from which she selected appellant as the robber.

Gang Evidence

Several LAPD officers gave gang-related evidence at appellant's trial. Officers Clark and Fontes testified regarding the RAC gang. The gang had approximately 350 to 360 members in 2005. RAC members wear blue, which is the color of the Crip nation. An RAC member would never wear red, since that is the color of their mortal enemies, the Blood gangs such as DLB. RAC and DLB share a border. RAC's primary activities include homicides, shootings, street robberies, bank robberies, and burglaries. The

officers testified regarding convictions for serious felonies of two RAC members in 2003 and 2004.

Officer Clark testified that it is common for an older gang member to take a new gang member under his wing. The new member may adopt the older member's moniker. If the newer member were shot by a rival gang member, the older member would be obliged to retaliate against someone in the rival gang, although not necessarily the shooter. Appellant was the mentor to shooting victim Blythe, one of two RAC members who were shot during the afternoon of the day Myles was shot.

Officer Clark stated that appellant was a very proud and bold member of RAC. He would do almost anything to defend the gang name. He took many risks and engaged in deeds without caring whether he was seen. It seemed appellant believed he was untouchable.

The prosecutor posed two hypothetical questions to Officer Clark. The first hypothetical (discussed *infra*) was based on the shooting of a younger RAC gang member called Little Pooh and the later shooting of someone in DLB territory. The second hypothetical was based on the facts of the robbery of three females in RAC territory. Officer Clark was of the opinion that the robbery was committed for the benefit of a criminal street gang. RAC could sell the stolen items and use the money to buy narcotics, which could then be sold to buy weapons. The robberies also helped create an atmosphere of fear and intimidation in the community, which deters witnesses from reporting the gang's activities.

Defense Evidence

Detective Arenas testified that there were four shootings in the Southeast Division on the evening of March 24, 2005. A white Monte Carlo was involved in the first two shootings and in the fourth. The third shooting was the murder of Myles in DLB territory, and it involved a black Dodge Intrepid.

Dorothy Ann Pulliam lived on Laconia Boulevard and was a member of the neighborhood homeowners' association. The association met once a month to discuss the community and share information about crimes that had been committed. An officer

from Southeast Division attended every meeting. She had never heard of an incident in which someone had kicked in the window of a car occupied by females and stolen their property. The only incident she recalled occurred in the spring, and that was a fight between three to five females. Pulliam knew appellant because he had grown up on her street, and she was a friend of his grandmother. She sometimes saw him hanging out on her street. To her knowledge, appellant was not a gang member.

M. Hider was the county parks and recreation director assigned to Helen Keller Park, which was in RAC territory. Prior to that, he was a volunteer coach. Appellant grew up across the street from Helen Keller Park. He began to participate in park activities at the age of seven or eight. Hider coached appellant in sports through junior high and high school. Hider did not allow known gang members to play in the park league. To Hider's knowledge, appellant was not a gang member. He never got into trouble with members from other teams, even when their team traveled into Blood territory. Appellant actually tried to prevent trouble from occurring. Hider acknowledged it was possible that appellant and others hid their gang membership from Hider because he disapproved of gangs. Appellant stopped playing in the park league in 2004.

Rebuttal Evidence

Detective Arenas testified that the fourth shooting on May 24, 2005, occurred in the area of 91st Street and Vermont Avenue, which was the territory of the Hoover gang. Detective Arenas's research indicated that the victim of that shooting was not a member of the Hoover gang, although he believed the shooting was gang motivated. The first shooting on that day, at 97th Street and Vermont Avenue, occurred at 6:45 p.m. and was also in Hoover gang territory. There was no evidence that the victim of that shooting was a Hoover gang member.

DISCUSSION

I. Denial of Motion to Sever

A. Appellant's Argument

Appellant contends that the trial court's denial of severance of the robbery counts from the other counts was an abuse of discretion and that joinder resulted in gross unfairness and the denial of due process. He asserts that the evidence on the crimes jointly tried would not have been cross-admissible, and the trial court erred when stating that separate trials would be burdensome. Additionally, the identification evidence in the robbery charges had a spillover effect on the weak eyewitness identification on the murder and attempted murder counts. Thus, trying the counts together bootstrapped a weaker case with a stronger one and was prejudicial. Furthermore, the jury was not instructed with CALCRIM No. 3515, which would have told them to consider each count separately. According to appellant, reversal is compelled.

B. Relevant Authority

Section 954 provides in pertinent part that "[a]n accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more accusatory pleadings are filed in such cases in the same court, the court may order them to be consolidated." "Because consolidation ordinarily promotes efficiency, the law prefers it." (*People v. Ochoa* (1998) 19 Cal.4th 353, 409.)

If the statutory requirements for joinder are met, the defendant bears the burden of showing error by demonstrating potential prejudice in light of the showings then made and the facts then known. (*People v. Ochoa, supra,* 19 Cal.4th at p. 409; *People v. Cummings* (1993) 4 Cal.4th 1233, 1284.) The trial court must balance the potential prejudice of joinder against the state's strong interest in the efficiency of a joint trial. (*People v. Bean* (1988) 46 Cal.3d 919, 935-936.) We review the trial court's decision on a motion for severance for abuse of discretion. (*People v. Ochoa, supra,* at p. 408.)

Prejudice may be shown and a trial court's refusal to sever consolidated counts may constitute an abuse of discretion where """(1) evidence on the crimes to be jointly tried would not be cross-admissible in separate trials; (2) certain of the charges are unusually likely to inflame the jury against the defendant; (3) a 'weak' case has been joined with a 'strong' case, or with another 'weak' case, so that the 'spill-over' effect of aggregate evidence on several charges might well alter the outcome of some or all of the charges; and (4) any one of the charges carries the death penalty or joinder of them turns the matter into a capital case.""" (*People v. Jenkins* (2000) 22 Cal.4th 900, 947-948 (*Jenkins*).) These considerations are not all of equal weight. (*Id*. at p. 948.) For example, the cross-admissibility of evidence is not essential to negate prejudice. (*Ibid*.)

C. Proceedings Below

At a pretrial proceeding on September 13, 2006, defense counsel requested that the robbery counts be severed from the murder and attempted murder counts. After hearing argument and conducting research, the trial court stated, "I've looked at both these cases: *People versus Jenkins* [(2000) 22 Cal.4th 900] and *People versus Bradford* [] [1997] 15 Cal.4th 1229. The only concern I have with this is whether or not the case which is sought to be severed causes any extra prejudicial effect on the defendant. It seems to me no matter what this does, the prejudicial effect will still be there. That's part of the consideration I have to give on the motion for severance. Because of that it's going to be there anyway; the potential of a second trial to go through this, rather than having it done at one time is not only burdensome but it's not of any beneficial effect. We could even look at it as there's a benefit to have the two robbery cases, which are second degree robberies, joined with a murder and two attempted murders. It's not like you have a second degree robbery being joined by a murder case. That's weak to enhance to robbery case. It seems that the use of these two matters with the witnesses that are going to come in anyway is not going to change any prejudicial effect where the defendant is concerned. The factors of joinder have been met. It's not like it's an M.O. case or anything of that kind, but the two different dates alone, and the two different victims don't prevent the joinder in this case. So I'm going to allow it to remain joined as it is because the

testimony is going to come in that will still bring in—whatever is prejudicial will still be coming in. So the case will remain joined. It's your motion for severance that's denied."

Defense counsel reiterated that she believed that severance had already been granted at an earlier proceeding. The trial court responded, "Even if there was a motion for severance granted in the past, based on what we have here that it would not be anymore prejudicial to the defendant, I'll say I'm granting the consolidation motion. This way your objection still remains open."

D. No Abuse of Discretion

In the instant case, the statutory requirements of section 954 were met in that the murder in count 1, the attempted murders in counts 4 and 5, and the robberies in counts 2 and 3 belong to the same class of crimes. All of these offenses are crimes against the person contained in Title 8 of the Penal Code, and they involve the common element of an assault upon the victim. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1243; *People v. Walker* (1988) 47 Cal.3d 605, 622; *People v. Thomas* (1990) 219 Cal.App.3d 134, 139-140.)

As the trial court noted, the cross-admissibility of the two incidents was probable, given the fact that appellant was accused of committing both crimes for the benefit of the gang, and one of the two incidents would be admissible in the trial of the other to prove the gang allegation. Therefore, appellant would derive no benefit from severance of the charges. Even if the evidence, apart from the gang evidence, were not cross-admissible, the California Supreme Court has dispelled any argument that severance is always required where cross-admissibility of evidence does not exist, even where capital offenses are involved and identical crimes against separate individuals are joined. (*Jenkins, supra*, 22 Cal.4th at p. 948; *People v. Balderas* (1985) 41 Cal.3d 144, 173.)

Moreover, the other *Jenkins* factors do not support a finding of prejudice. The evidence of appellant's robbery crimes was not likely to inflame the jury, since no person was seriously harmed. Contrary to appellant's assertion that the murder and attempted murder counts constituted a weaker case that was bolstered by the robbery case, the strong identification evidence of appellant by Officer Mejia required no bolstering. Also,

given the disparate circumstances of the two incidents, bolstering of the murder and attempted murder counts was not likely to occur. Finally, neither of the two incidents involved the death penalty, and joinder did not render appellant death-eligible.

Furthermore, a trial court's decision on a severance motion is to be assessed considering the information before the court at the time of the decision. (*People v. Marshall* (1997) 15 Cal.4th 1, 27; *People v. Balderas, supra,* 41 Cal.3d at p. 409.) At the time the trial court heard the motion, only the preliminary hearing had taken place. At the hearing, a confidential informant testified that appellant had admitted the shootings. Hillman did not testify at the preliminary hearing about the robberies, and the only testimony as to those crimes was provided by a police detective. Therefore, prior to trial, it did not appear that the robbery counts would be the stronger case. We conclude appellant did not suffer substantial prejudice due to the trial court's denial of his severance motion, and there was no abuse of discretion.

On appeal, of course, we must consider the actual impact of joinder on appellant's trial, even though we have concluded there was no abuse of discretion. (*People v. Ochoa, supra,* 19 Cal.4th at p. 409; *People v. Bean, supra,* 46 Cal.3d at p. 940.) We look to the evidence introduced at trial to determine whether appellant was deprived of a fair trial or due process of law. (*People v. Bean, supra,* at p. 940.) A defendant must make a stronger showing of prejudice when appealing denial of severance, since the trial court has wider discretion in denying severance than in the admissibility of evidence. (*People v. Cummings, supra,* 4 Cal.4th at p. 1284; *People v. Bean, supra,* at p. 936.)

We conclude there is nothing about this consolidation that violated appellant's state or federal constitutional rights. (See *United States v. Lane* (1986) 474 U.S. 438, 446, fn. 8 [improper joinder does not in itself violate the Constitution; this occurs only if the error is so great that it denies a defendant the Fifth Amendment right to a fair trial].) The evidence of appellant's guilt in the murder was strong. Officer Mejia identified appellant from a photographic lineup and identified him in court. The jury asked for a read back of her testimony and convicted appellant after hearing her testimony again. Officer Fontes saw appellant in a red beanie, a color not worn by a non-Blood gang

member, on the day of the shooting. The witnesses saw the shooter wearing a red beanie. Appellant was known as Pooh, and a fellow gang member named Little Pooh had recently been shot. The gang expert testified that revenge would certainly be called for in this situation. Appellant was known to drive a dark green Intrepid, the type of car seen leaving the shooting. We perceive no indication that a spillover effect from the robbery evidence improperly influenced the jury's verdicts by causing an emotional bias against appellant. (See, e.g., *People v. Musselwhite*, *supra*, 17 Cal.4th at p. 1247; *People v. Bean*, *supra*, 46 Cal.3d at p. 940.)

"Determination of a severance issue is 'a highly individualized exercise, necessarily dependent upon the particular circumstances of each individual case.' [Citation.]" (*People v. Balderas*, *supra*, 41 Cal.3d at p. 173.) In this case, the trial court's denial of the severance motion was not """outside the bounds of reason""" and was not an abuse of discretion. (*Jenkins*, *supra*, 22 Cal.4th at p. 947.)

II. Alleged Ineffective Assistance of Counsel

A. Appellant's Argument

Appellant contends that the prosecutor elicited inadmissible opinion from the gang expert—opinion related to appellant's subjective knowledge and intent—as well as cumulative and prejudicial testimony regarding appellant's prior police contacts and arrests. Although defense counsel objected, the objections were either too late or were made on improper grounds.

According to appellant, his counsel's failure resulted in his being deprived of a fair trial and due process as guaranteed by the Fourteenth Amendment of the United States Constitution in that the People's burden of proving each element of the charged offense was lessened. It also deprived appellant of the right to have the jury decide his guilt as guaranteed by the Sixth and Fourteenth Amendments.

B. Relevant Authority

To establish ineffective assistance of counsel, appellant must first show that counsel's "acts or omissions were outside the wide range of professionally competent assistance." (*Strickland v. Washington* (1984) 466 U.S. 668, 690 (*Strickland*).)

Appellant must establish that the challenged act or omission did not result "from an informed tactical choice within the range of reasonable competence." (*People v. Pope* (1979) 23 Cal.3d 412, 425.) If the record sheds no light on why counsel acted or failed to act, the appellate court should affirm unless there could be no satisfactory explanation for the act or omission. (*People v. Ledesma* (1987) 43 Cal.3d 171, 218.)

Secondly, appellant must show that the alleged deficiencies in counsel's performance were prejudicial to the defense, i.e., that there is a reasonable probability that but for counsel's unprofessional errors, the outcome of the case would have been different. (*Strickland*, *supra*, 466 U.S. at pp. 692, 694; *People v. Ledesma*, *supra*, 43 Cal.3d at pp. 217-218.) A reasonable probability is one "sufficient to undermine confidence in the outcome." (*Strickland*, *supra*, at p. 694; *People v. Ledesma*, *supra*, at p. 218.)

A reviewing court need not assess the two factors of the inquiry in order, and if a defendant makes an inadequate showing on one factor, the court need not address both components of the inquiry. (*Strickland*, *supra*, 466 U.S. at p. 697.) Thus, if the record reveals that appellant suffered no prejudice, we may decide the issue of ineffective assistance of counsel on that basis alone. (*Ibid*.)

C. Counsel Not Ineffective for Failing to Object to Expert Opinion Testimony

1. Officer Clark's Testimony

Appellant's criticism of trial counsel's failures begins with the testimony of gang officer Brett Clark. During the first portion of testimony to which appellant now objects, Officer Clark expressed his opinion, based on his training and experience, as to what would occur if a known gang member's "little brother" or "mentee" were shot by a rival gang member. Officer Clark said the known gang member would be angry, feel responsible, and would "take care of it himself." If he did not, others would tell him to "take care of business." Defense counsel addressed the court several days later and stated that certain "profile evidence"—evidence that states the gangs act in a certain way and imply that the defendant acted this way—should not have been given and should be

excluded. The trial court ruled the testimony was relevant to the issue of whether the crimes benefited the gang.

The prosecutor asked Officer Clark to assume that a member of RAC with the moniker Pooh was a mentor to another gang member called Little Pooh and that Little Pooh was shot by DLB. Officer Clark was to assume that two hours later, Pooh and another gang member went to DLB territory and shot three people. Also, Pooh had a teardrop tattoo on his cheek within weeks. Officer Clark was asked whether the shootings were committed to benefit the RAC, and Clark said that they were. When Officer Clark said that his opinion was based on the fact that the RAC shooting was due to retaliation, which is typically done out of anger and to maintain street credibility, defense counsel objected to "improper profile evidence." The trial court overruled the objection. Officer Clark further said, however, "Specific to this case, as far as Little Pooh and Pooh, I'm sure Pooh would feel obligated because I'm sure he took Little Pooh under his wing, promised him money." Defense counsel objected on the ground there was a lack of foundation for these assertions and for the state of mind of anyone named Pooh, and the trial court sustained the objection. The trial court granted defense counsel's motion to strike, stating, "Might have gone outside of the hypothetical, and motion to strike is granted." Officer Clark then stated, "Maybe he had a close liking to Little Pooh." Defense counsel objected on the ground of a lack of foundation as to the state of mind of he who would have a close liking to "Little Pooh." The trial court overruled the objection, stating, "That's not far outside of hypothetical." The trial court also overruled counsel's objection to Officer Clark's next statement: "Since maybe they assume the role of big brother, little brother, kind of thing."

Officer Clark then stated, as he had earlier, that Pooh would feel obligated and angry, and his peers would tell him to take care of it. The trial court overruled the defense objections based on lack of foundation and to the state of mind with respect to anger and feeling obligated. The prosecutor asked Officer Clark if he was saying that it benefited the gang to retaliate for what was considered to be an insult to the gang, and

Officer Clark replied, "Correct." Defense counsel objected and the trial court overruled the objection.

Appellant maintains that Officer Clark's testimony about appellant's subjective knowledge and intent went too far. Citing *People v. Killebrew* (2002) 103 Cal.App.4th 644, appellant asserts that Officer Clark improperly expressed an opinion about appellant in particular, not gangs in general. He spoke of appellant's subjective expectations and intent, and in so doing, told the jury how to decide the case, usurping its function. If counsel had timely objected under *Killebrew*, the trial court would have been obliged to sustain the objection. At the very least, appellant argues, the issue would have been preserved for appeal.

2. Testimony Within Proper Scope; Appellant Suffered No Prejudice

It is well established that an expert may offer opinion testimony if the subject is sufficiently beyond common experience so that it would assist the trier of fact. (Evid. Code, § 801, subd. (a); *People v. Ochoa* (2001) 26 Cal.4th 398, 438; *People v. Gardeley* (1996) 14 Cal.4th 605, 617 (*Gardeley*); *Killebrew*, *supra*, 103 Cal.App.4th at p. 651.) In order to assist the trier of fact, the culture and habits of criminal street gangs are proper subjects for an expert's opinion. (*Gardeley*, *supra*, at p. 617; *People v. Valdez* (1997) 58 Cal.App.4th 494, 506.) A properly qualified gang expert may, where appropriate, testify to a wide variety of matters, including but not limited to, whether and how a crime was committed to benefit or promote a gang; the motivation for a particular crime; a gang's culture, habits, and territory; and rivalries between gangs. (*Killebrew*, *supra*, at pp. 656-657, and authorities cited therein.) Such testimony may address the ultimate issue in the case (Evid. Code, § 805; *Killebrew*, *supra*, at p. 651) and may be based on hypothetical questions derived from the facts of the case (*Gardeley*, *supra*, at p. 618).

The objectionable testimony in *Killebrew* consisted of the expert's opinion that "each of the individuals" in three different cars knew there was a gun in two of the cars and each individual "jointly possessed the gun with every other person in all three cars for their mutual protection." (*Killebrew*, *supra*, 103 Cal.App.4th at p. 658.) The expert also testified "that when one gang member in a car possesses a gun, every other gang

member in the car knows of the gun and will constructively possess the gun." (*Id*. at p. 652.) The *Killebrew* court noted there was nothing in the evidence to support this opinion. Further, this testimony improperly addressed the subjective knowledge and intent of each individual in each vehicle. (*Id*. at p. 658.) Because the expert's testimony was based on nothing more than the expert's opinion as to how the case should be decided and was the only evidence offered to establish the knowledge element of the charged offense of conspiracy, reversal was required. (*Id*. at pp. 658-659.)

In this case, Officer Clark did not give an opinion as to how the case should be decided, he strayed only once into mentioning this "specific case," and his expert testimony was far from the only evidence offered to establish the elements of the crime. Moreover, the trial court struck the objectionable response. Officer Clark responded to the prosecutor's request to explain the relationship between older and younger gang members, especially those who share a moniker, which is an aspect of gang culture. Officer Clark spoke in the general terms elicited by the hypothetical questions, even if one of the general terms referred to a gang member whose moniker was Pooh. Because one of the young RAC gang members who was shot earlier in the day of Myles's murder had the moniker of "Little Pooh," this reference to an older gang member named Pooh was relevant and probative on the issue of motive. As in *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1371, Officer Clark's testimony related to "what gangs and gang members typically expect and not on [appellant's] subjective expectation." Clearly, *Killebrew* does not preclude the prosecution from eliciting expert testimony that provides the jury with information from which it may infer the motive for a crime or the perpetrator's intent.

As the California Supreme Court stated in *People v. Gonzalez* (2006) 38 Cal.4th 932, 946 (*Gonzalez*) "we read *Killebrew* as merely 'prohibit[ing] an expert from testifying to his or her opinion of the knowledge or intent of a defendant on trial.'" Although there was testimony that appellant's moniker was Pooh, the hypothetical was cast in general terms, and it left to the jury the decision whether appellant was an RAC member who was sufficiently motivated to carry out a retaliation shooting.

Further, although it is true that the officers' opinions, if found credible, might, together with other evidence, lead the jury to find appellant committed the offense, this renders the evidence probative rather than inadmissible. (*Gonzalez, supra,* 38 Cal.4th at p. 947.) Appellant attempted to discredit all the testimony that labeled him an active RAC member, and he characterized his gang activity as consisting of standing around and loafing in his neighborhood, being more or less a "fire hydrant." Apart from Officer Mejia's identification, which defense counsel strenuously discredited, a jury might wonder why appellant, of all gang members, was identified as the one who carried out such a cold-blooded attack on a complete stranger. The fact that appellant shared a moniker with an RAC shooting victim rendered the gang expert's testimony highly relevant and probative on the issue of motive. "'The law does not disfavor the admission of expert testimony that makes comprehensible and logical that which is otherwise inexplicable and incredible.'" (*Gonzalez, supra,* at p. 947.)

There was nothing in Officer Clark's testimony that was the equivalent of an opinion that appellant was guilty. (See *People v. Valdez, supra,* 58 Cal.App.4th at p. 509.) Even if the trial court had stricken all of the officer's testimony, there is no reasonable probability that the jury would have returned a verdict more favorable to appellant. (See *People v. Price* (1991) 1 Cal.4th 324, 433 [employing standard *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*)].)

Having concluded that the gang expert testimony was admissible under state law, relevant to the issues in this case, and, was not unduly prejudicial, we believe appellant's constitutional claims of a violation of due process, the right to a fair trial, and the right to have a jury decide his guilt must fail. (See, e.g., *People v. Carter* (2003) 30 Cal.4th 1166, 1196 [defendant's claim of federal constitutional error is entirely dependent on claim of state law error and must also fail]; *People v. Ayala* (2000) 23 Cal.4th 225, 253 ["There was no violation of state law, and because defendant's constitutional claims are predicated on his assertion that state law was violated, they too must fail"].) It follows that his trial counsel was not ineffective in failing to properly object, as appellant claims.

Any failure by counsel to object at the time and in the manner appellant deems appropriate did not result in prejudice to him.

D. Counsel Not Ineffective for Failing to Object to Evidence of Appellant's History of Police Contacts

Appellant also argues that nine of the 10 officers called to testify about appellant's new teardrop tattoo and about his association with gang members offered testimony cumulative to that of Officer Clark. His counsel complained about the number of witnesses who testified about gang information *after* the 10 officers had testified, which was too late to allow the court to cure the prejudice. Counsel also failed to ask for a mistrial or request that the testimony be stricken. Moreover, the evidence was prejudicial, since it could only evoke an emotional response against appellant and permit the jury to improperly draw the inference that appellant was criminally disposed to commit murder. According to appellant, had counsel timely objected under Evidence Code section 352, the trial court would have been compelled to exclude or limit the testimony.

1. The Testimony

The record shows that, in addition to Officer Clark, Officer Roger Fontes also testified as an expert gang witness. Officer Fontes had had at least 50 contacts with appellant, which included one arrest. He identified appellant in a photograph with another individual in which both were wearing neck chains. Officer Fontes explained that the chains identified them as part of an individual crew within the gang. Most significantly, it was Officer Fontes who saw appellant wearing the red beanie on the day of the instant murder and who documented this fact on an FI card. Officer Fontes explained the delay in getting the information about the red beanie to the investigating officer, Detective Arenas. He also noted the absence of a teardrop tattoo on appellant's face and testified as to its significance, which he knew from his experience.

Officer Christopher Cuff testified briefly about a traffic stop he conducted on April 24, 2004, and he identified appellant as the driver of a green 1995 Buick Riviera. Appellant identified himself as an RAC member and Officer Cuff noted his tattoos,

which did not include a teardrop on his face. He linked appellant to the address on West 53rd Street and he provided foundation for photographs he took of appellant showing his tattoos.

Officer Alexander Rivera testified directly after Officer Cuff and also very briefly. He testified about an incident that occurred on June 26, 2004, when he stopped a member of a Bloods gang, and appellant and other RAC members appeared across the street and screamed "Raymond Crips" and threw signs. Appellant admitted his affiliation to Officer Rivera. Officer Rivera authenticated a photograph of appellant that he took on that occasion. The photograph showed appellant's dark clothing and no tattoo on his face.

Officer Marvin Mancia conducted a traffic stop of appellant on February 4, 2005. He stated only that appellant admitted his RAC membership after Officer Mancia gave him a warning. His testimony covers less than two pages.

Deputy Michael Jimenez made contact with appellant on October 10, 2003. Although appellant made no gang admission that day, he wore a T-shirt saying RAC and he was with other RAC members. The officer noted no teardrop tattoo. In a subsequent contact on September 25, 2004, Deputy Jimenez noted appellant's "DUB" tattoo, lack of a teardrop, and appellant's self-admission of his gang membership.

Deputy James Andrews knew appellant and testified regarding an FI card he filled out on appellant on April 7, 2004. The card noted that appellant identified himself as an RAC member. Appellant also admitted his gang affiliation to Deputy Andrews on February 23, 2004.

Officer Patrick Flaherty filled out an FI card on appellant on April 26, 2005. The card noted that appellant had a teardrop tattoo on his left eye that was raised above the skin and still had a scab. It was no more than three weeks old. Officer Flaherty documented the tattoo because he was familiar with appellant and his tattoos, and he knew this tattoo was newly acquired. His experience with others he had interviewed led him to believe that teardrop tattoos indicate that the wearer killed someone. He also noted appellant's gold necklace with the word "Pooh" on it. Appellant said his moniker

was Big Pooh, and gave his grandmother's address on West 126th Street as an alternate address.

Officer John Jamison testified that he stopped appellant in a car in November 2004 and documented some of his tattoos. Appellant admitted being a member of RAC. In his several contacts with appellant he had noticed appellant acquiring more tattoos. The earliest he had seen a teardrop tattoo on appellant's face was a week or two after the homicide on 108th Street and Figueroa on March 24, 2005.

Officer Dominick Iasparro testified that he had documented a contact with appellant in August 2004. This occurred at 863 West Laconia Boulevard a known RAC hangout. Appellant admitted being an RAC member and said his moniker was Pooh. Officer Iasparro documented another encounter in April 2005 in front of 751 West Laconia Boulevard, another known RAC hangout located approximately half a block from the first contact. Appellant said he was a member of RAC.

2. Evidence Relevant; Any Error Harmless

We conclude that the testimony of most of the officers was relevant to aspects of the prosecution's case and was not cumulative. Defense counsel was not ineffective for failing to object.

Relevant evidence is evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) "The test of relevance is whether the evidence tends 'logically, naturally, and by reasonable inference' to establish material facts such as identity, intent, or motive. [Citations.]" (*People v. Garceau* (1993) 6 Cal.4th 140, 177; see also *People v. Carter* (2005) 36 Cal.4th 1114, 1166.) The standard of relevance embodied in Evidence Code section 210 is a very broad one. (*People v. Scheid* (1997) 16 Cal.4th 1, 16.) Relevancy is not restricted to the precise factual issue alone. Evidence can also be relevant when it tends to establish a fact from which existence of another fact in issue can be directly inferred. (*People v. Cordova* (1979) 97 Cal.App.3d 665, 669.)

Even relevant evidence may be excluded under Evidence Code section 352, which provides that "[t]he court in its discretion may exclude evidence if its probative value is

substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." Evidence is substantially more prejudicial than probative if it poses an unacceptable risk to the fairness of the proceedings or the reliability of the outcome (*People v. Waidla* (2000) 22 Cal.4th 690, 724), or if it tends to evoke an emotional bias against the defendant "without regard to its relevance on material issues." (*Killebrew*, *supra*, 103 Cal.App.4th at p. 650.) Here, except for the brief testimony of Officer Mancia, the testimony of the officers related to specific aspects of appellant's gang membership and his motive, or it provided foundation for photographs of appellant or FI card notations regarding appellant.

The officers' accounts of their contacts with appellant spanned a time period from the shooting of Myles all the way back to October 2003, almost a year and a half before the shooting. The officers' testimony thus showed appellant's longevity in the gang. The frequency of the contacts and the documentation of appellant's acquisition of more and more tattoos showed appellant's deepening commitment to his gang, which was relevant to motive as well. The testimony of some of the officers was required to document photographs that were relevant to show that, despite having many gang-related tattoos, appellant did not have a teardrop tattoo until after the shooting of Myles. The testimony of Officer Fontes was relevant because it was he who saw appellant wearing the red beanie on the day Myles was shot. Officer Flaherty noticed that the teardrop tattoo was fresh approximately one month after the shooting, and he also testified that appellant wore the "Pooh" medallion. Appellant gave Officer Flaherty his grandmother's address, where one of the search warrants was executed, as an alternate address. Officer Jamison confirmed the dating of the teardrop tattoo. Officer Iasparro tied appellant to the RAC hangouts on West Laconia Boulevard, where the robbery of Hillman and her friends occurred.

The evidence was also relevant to rebut the testimony on appellant's behalf by his coach, Hider. Hider testified that he never knew appellant to be a gang member, but noted that appellant stopped playing in the park league in 2004. The officers' testimony

showed that appellant began his association with RAC by at least October 2003 and that in February 2004, appellant self-admitted his gang affiliation. Counsel specifically drew on Hider's testimony, stating "you got to hear something about [appellant] from two sources. One source being the officers that have stopped him, and the other source being the people that are not officers, like Mr. Hider who knows him. First thing to note about what we heard about Mr. Murphy, no evidence of criminality." Counsel later discussed at length the implications of Hider's testimony—that appellant could act like a good citizen and he was trying to be part of something that "takes you up."

Moreover, although eight officers testified in addition to the two experts, none of the officers' encounters with appellant were of an inflammatory nature, so as to evoke an emotional response against appellant or serve as evidence of a criminal disposition on his part. Appellant was stopped for traffic stops or just because he was seen hanging out with other men or making fun of a rival gang member being arrested.

The nature of the various encounters played into defense counsel's strategy of portraying appellant's gang activity as consisting of standing on a sidewalk, sitting in a car, and standing in front of a liquor store, as opposed to being engaged in sinister activities. She argued "What do these officers say they see these people doing most of the time? They are loafing, hanging around, rolling dice. They are just hanging there, standing around in the park, standing around on Laconia, standing around at the liquor store. The Raymond Avenue neighborhood is an up and loafing neighborhood. That's the most you can say about them. That's the most she has proven about them." Counsel referred to the officers' testimony several times, saying at one point, "And when asked what it is that Mr. Murphy was doing, they indicated to you he was hanging around. There's an FI card that talks about gang loitering, standing in front of a liquor store, but no evidence that Mr. Murphy—from these gang officers that Mr. Murphy robbed someone. No evidence from these gang officers that Mr. Murphy burglarized a home. No evidence of that. Basically they said Mr. Murphy is a hanger, not a banger." Counsel used the various officers' testimony to argue that appellant was not shown to be a disrespectful person with authority.

Defense counsel also used the evidence to argue that the prosecutor was trying to frighten the jurors. Counsel stated, "Once you get past the scare tactics and he's a major gang member, and Raymond Avenue is so vicious and terrible, then you can start focusing on really what are the facts of this case."

Although there was some overlap in the officers' accounts of their contacts with appellant, there was a purpose in presenting almost every encounter. To the extent portions of the various officers' testimony were cumulative to the expert gang testimony, we conclude any such error was harmless under either the *Watson* standard or the *Chapman* (*Chapman v. California* (1967) 386 U.S. 18, 24) standard. The result would have been the same had portions of the challenged testimony not been admitted. (*Chapman v. California, supra,* at p. 24.) Accordingly, we conclude that defense counsel was not ineffective for failing to object.

III. Cumulative Error

Appellant contends that, in the event the errors discussed in his first two arguments do not individually require reversal, the errors cumulatively prejudiced appellant's right to a fair trial.

Because the only possible errors we have found were harmless, we conclude there was no cumulative effect warranting reversal. (*People v. Mayfield* (1993) 5 Cal.4th 142, 197 [finding of several flaws not sufficient to persuade court that, had flaws not occurred, there was a reasonable possibility defendant would have achieved a better result].) Our review of the record assures us that appellant received due process and a fair trial. (See *People v. Ashmus* (1991) 54 Cal.3d 932, 1006.) As the California Supreme Court has stated, "[a] defendant is entitled to a fair trial, not a perfect one." (*People v. Mincey* (1992) 2 Cal.4th 408, 454.)

IV. Sufficiency of the Evidence Supporting 12022.53, Subdivision (d) Allegation

A. Appellant's Argument

Appellant contends that insufficient evidence supports the true findings on the gun-use enhancements alleged pursuant to section 12022.53, subdivision (d) in counts 4 and 5, the attempted murders of Smith and Givens. According to appellant, there was

insufficient evidence that the victims in those counts suffered great bodily injury. Accordingly, the enhancements and the sentences of 25 years to life imposed for each must be stricken.

B. Relevant Authority

When reviewing the sufficiency of the evidence, we apply the substantial evidence test, which requires that we determine "'whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] [¶] Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder. [Citations.]'" (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

C. ***Enhancements Properly Imposed***

We agree with respondent that the resolution of this issue is controlled by the decision in *People v. Oates* (2004) 32 Cal.4th 1048 (*Oates*). It is true that, in that case, the defendant claimed that section 654 prohibited the imposition of section 12022.53, subdivision (d) enhancements in each count of attempted murder. (*Oates, supra,* at p. 1054.) The holding and reasoning of *Oates*, however, also resolve the issue appellant sets out in this case.

In *Oates*, the defendant fired two shots into a group of people, hitting and injuring only one of them, Barrera. Defendant was convicted of five counts of attempted premeditated murder, one count for each person in the group. The trial court imposed consecutive enhancements under section 12022.53, subdivision (d) and section 12022.53, subdivision (c) on two of the counts and stayed the remaining enhancements pursuant to section 654. (*Oates, supra,* 32 Cal.4th at pp. 1053-1054.)

The Supreme Court reversed and held that a defendant could be punished with multiple enhancements under section 12022.53, subdivision (d) after firing several shots at a group of people, even though he injured only one. (*Oates*, *supra*, 32 Cal.4th at pp. 1053, 1054-1057.) The requirements of section 12022.53, subdivision (d) were met as to each of the defendant's five attempted murder convictions because "attempted premeditated murder constitutes a specified offense (§ 12022.53, subd. (a)(1), (18)), and, in the commission of each offense, defendant 'personally and intentionally discharge[d] a firearm and proximately cause[d] great bodily injury' to a person 'other than an accomplice.' (§ 12022.53, subd. (d).)" (*Oates*, *supra*, at p. 1055.)

The *Oates* court rejected the argument that the number of subdivision (d) enhancements should be limited to the same number of great bodily injuries inflicted, concluding that subdivision (f)[2] "*requires* that the enhancement be imposed as to each conviction." (*Oates*, *supra*, 32 Cal.4th at p. 1056.) The court found the Legislature chose to limit the number of subdivision (d) enhancements "imposed only 'for each crime,' not for each transaction or occurrence and not based on the number of qualifying injuries." (*Id*. at p. 1057.) The court observed that, "[h]ad the Legislature wanted to limit the number of subdivision (d) enhancements imposed to the number of injuries inflicted, or had it not wanted subdivision (d) to serve as the enhancement applicable to each qualifying conviction where there is only one qualifying injury, it could have said so." (*Id*. at p. 1056.) "Here, there is no evidence of a contrary legislative intent. Nor is there any reason to believe the Legislature simply overlooked the kind of factual scenario at issue here, which is not particularly unusual." (*Id*. at p. 1057.)

As with the *Oates* defendant, appellant fired several shots, some directly at Myles as he came through the gate and some directed upward at the watchers on the balcony, hitting Smith. Appellant discharged his gun numerous times, putting multiple people at

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2 Section 12022.53, subdivision (f) provides in pertinent part that, "Only one additional term of imprisonment under this section shall be imposed per person for each crime."

risk of injury. The crimes he committed were qualifying crimes under section 12022.53, subdivisions (a) (1), (18), and (19). The jury found that in the commission of these three offenses, appellant personally and intentionally discharged a firearm and proximately caused great bodily injury in all three counts. Thus, as in *Oates*, the great bodily injury to Myles, which led to his death, constitutes a sufficient factual predicate to support imposition of a subdivision (d) enhancement as to all three offenses.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

CHAVEZ